United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

74-2479

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GREENE BERRY MULLENS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CRIMINAL 1973-375.

BRIEF FOR THE APPELLANT

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1

TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES.

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Docket No. 74-2479

UNITED STATES OF AMERICA,

Appellant,

v.

GREENE BERRY MULLENS,

Appellee.

BRIEF FOR THE APPELLANT

Preliminary Statement

The appellee, Greene Berry Mullens, was indicted on December 12, 1973 on charges of making counterfeit obligations of the United States in violation of Title 18, United States Code, Section 471 and possession of counterfeit obligations in violation of Title 18, United States Code, Section 472.

Pursuant to warrant (Ex. 1, A. 1-3)[1] executed at 1536 Jefferson Avenue, Buffalo, New York, the home of the appellee, City of Buffalo Police and Secret Service Agents seized $10,410.00 in counterfeit $10 and $20 Federal Reserve Notes (A. 55-56).[2] Subsequent to that seizure, the

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[1] Reference to Appendix.

[2] GOVERNMENT EXHIBIT 16 PAGE 1
U. S. SECRET SERVICE
TREASURY DEPARTMENT
[ ] Original Case file No. J-1-3-CO-4796-2
[x] Duplicate Office Buffalo (1-3)
Date of inventory January 16, 1974

(Footnote continued on following page)

defendant arrived at Buffalo Police Headquarters and admitted his complicity (A. 15, 50). He then agreed to

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(Footnote continued from preceding page)

CERTIFIED INVENTORY OF PROPERTY TO BE ACCOUNTED FOR AND HELD IN EVIDENCE AGAINST:
GREENE BERRY MULLENS

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK
(Judicial District)

CASE DISPOSED OF ....., 19.....

PROPERTY DESTROYED OR DISPOSED OF .....
(Do not use)

(1) I certify that I received the property described in this inventory of 2 pages:

(Illegible) Title Special Agent
Forwarded by SENGE V. MEANS, SAIC.

(2) Received at Washington, D. C., on the ..... day of ....., 19 ....., the property described in this inventory .....
Custodian.

Date Passed	Quantity	Name and Description of Article	Counterfeit Value
Seized 12/7/73	143	Cft. $20 FRN (c4796), Serial No. B97710870B, marked SJZ 12/7/73.	$ 2,860.00
Seized 12/7/73	330	Cft. $20 FRN (c4797), Serial No. B01911197B, marked SJZ 12/7/73.	$ 6,600.00
Seized 12/7/73	95	Cft. $10 FRN (c4798), Serial No. D01203480B, marked SJZ 12/7/73.	$ 950.00
Seized 12/7/73	2	Sheets of uncut Cft. Notes each containing one $20 FRN (c4796); one $20 FRN (c4797), and one $10 FRN (c4798); marked SJZ 12/7/73. These were found in ashes of burnt cft. notes.	$ 100.00
Seized 12/7/73	1	A&P shopping bag found at 1536 Jefferson Avenue, Buffalo, containing clippings of Cft. Notes and seized cft.; marked SJZ 12/7/73.	
		TOTAL	$10,510.00

cooperate, and did so by taking the officers to 25 Wakefield Avenue where he then surrendered the aluminum plates used in the making of the counterfeit (A. 18-20) and then to 1361 Fillmore Avenue where he surrendered the printing press and other printing paraphernalia (A. 20-24). Then, sometime after 5:00 o'clock in the afternoon of that day, the defendant gave a full written confession (A. 51-54).

On or about March 7, 1974 the defendant moved to suppress the evidence seized as a result of the execution of the search warrant of December 7, 1973, at 1536 Jefferson Avenue on the grounds that probable cause for its issuance was lacking and, further, to suppress the additional evidence (A. 56-57)[3] on the ground that that was obtained as a result of the primary illegal taint. The Court, Curtin, J., ordered a hearing which was subsequently held on May 14, 1974.

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[3]

PAGE 2

U. S. SECRET SERVICE
TREASURY DEPARTMENT

Office Buffalo (1-3) Date January 16, 1974

Date Passed	Quantity	Name and Description of Article	Counterfeit Value
		Brought forward	$10,510.00
Seized 12/7/73	2	Aluminum plate containing two sets of face plates impressions for $20 FRN (c4796); $20 FRN (c4797), and $10 FRN (c4798) marked SJZ 12/7/73.	
Seized 12/7/73	2	Aluminum plate containing two sets of changeable features impressions for $20 FRN (c4796); $20 FRN (c4797) and $10 FRN (c4798) marked SJZ 12/7/73.	
Seized 12/7/73	1	Aluminum plate containing two sets of back plate impressions for $20 FRN (c4796), $20 FRN (c4797) and $10 FRN (c4798) marked SJZ 12/7/73.	

(Footnote continued on following page)

In its decision of October 4, 1974, the Court found that "the affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit, and so the warrant must fail." (A. 12). The Court deferred ruling on the suppression of the oral and written statements of the defendant as well as the evidence seized in the searches of 25 Wakefield Avenue and 1361 Fillmore Avenue. The Court has not yet ruled, although, under the law, there seems little doubt that this evidence will fall if the search warrant falls.

(Footnote continued from preceding page)

Date Passed	Quantity	Name and Description of Article	Counterfeit Value
Seized 12/7/73	1	Aluminum plate containing one set of back plate impressions for $20 FRN (c4796); $20 FRN (c4797), and $10 FRN (c4798) marked SJZ 12/7/73.	
Seized 12/7/73	1	Box Ansco Camera, Caslon 540, X-540; SS-DD1686-12.	
Seized 12/7/73	1	Can of Syn-Dry II, Universal Offset Duplicator Ink; Pantone 354 Green from Keystone Ink. Co., Philadelphia, Pennsylvania.	
Seized 12/7/73	1	Davidson Duplicating Press, Model No. 251; Serial No. 6715.	
Seized 12/7/73	2	Scissors.	
Seized 12/7/73	1	Quart container of Kodak Fixer, Solution A, with approximately 9 oz. remaining.	
Seized 12/7/73	1	36 Fluid Ounce container of Kodak Hardener, Solution B.	
Seized 12/7/73	1	7" by 7" Ovenex Baking tin.	
		TOTAL	$10,510.00

It is from that Decision and Order that the Government appeals. The Notice of Appeal was filed pursuant to Title 18, United States Code, Section 3731 on November 1, 1974.

Question Presented

The broad question is whether or not probable cause existed for the issuance of the search warrant. The narrower question is whether or not the Magistrate, in this case, Buffalo City Court Judge Samuel Green was able to exercise the required independent judgment where the affidavit did not set forth the underlying facts as to how the informant knew that the money was counterfeit.

Statement of Facts

The facts necessary for the determination of this appeal are very limited. On December 7, 1973, Detective Sergeant James E. Hunter, Buffalo Police Department, made application to Samuel L. Green, Judge of the City Court of Buffalo for a warrant to search premises, 1536 Jefferson Avenue, Upper Flat (Ex. 1, A. 1-3). That warrant issued. It was obtained on the basis of information set forth in Sgt. Hunter's affidavit, which information he had obtained from an unidentified informant on December 6, 1973 (A. 29). That affidavit stated in relevant part, paragraph 2 thereof:

> I have information based upon a reliable informant known to me for several years who in the past has given me information that has lead [sic] to arrest [sic] and convictions of other persons that he gave me information on [sic] has informed me that the above named person residing at the above named address has several hundred $10.00 bills counterfeit that he

> is attempting to sell and pass the same. This informant gave information that led to the arrest and conviction of one Ronald Kohlman for bank robbery December 1971 Judge Curtin. Also that on December 5, 1973 informant did see a suit case [sic] with the said bills in it at the above address and in the possession of Barry Mullens.

Hunter, the affiant, obtained that information from his informant sometime between 8:00 P.M. and 9:00 P.M. on December 6, 1973 (A. 30). He then saw City Court Judge Samuel Green who issued the warrant sometime between 9:00 and 9:45 A.M. on December 7, 1973 (A. 37). The warrant was then executed between 10:30 A.M. and 11:00 A.M. on that day (A. 14). At the suppression hearing, Det./Sgt. Hunter elaborated upon the reliability of his informant stating that he has known the informant for the past seven years and that he gave information which led to the arrest and conviction of four or five people, including Ronald Kohlman (A. 13). Hunter further testified that he knew the Mullens family for better than 20 years (A. 14) and knew them to live at 1536 Jefferson Avenue (A. 44-45). Hunter further testified that the informant described the suitcase as being blue in color (A. 40) and that that suitcase was found at the premises during the execution of the warrant (A. 40).

ARGUMENT

The affidavit in support of the search warrant informed the issuing Magistrate of some of the underlying circumstances from which the informant concluded that the counterfeit money was where he claimed it was.

In *Jones v. United States*, 362 U.S. 257 (1960), the Supreme Court strongly supported the preference to be accorded searches made under a warrant, indicating that in doubtful or marginal cases a search made pursuant to a warrant may be sustainable where without one it would fall. For example, in *Johnson v. United States*, 333 U.S. 10 (1947) and in *Chapman v. United States*, 365 U.S. 610 (1960) where the fruits of the search were suppressed, the Supreme Court indicated that, upon the same evidence, had the police obtained a warrant, the search would have been sustained. Thus, in close cases, the fruits of a search made pursuant to warrant should be ruled admissible, where otherwise inadmissible. See *United States v. Ventresca*, 380 U.S. 102 (1964).

When, as here, the affidavit in support of the search warrant is based upon informant information, the issuing magistrate must be informed "of some of the underlying circumstances from which the informant concluded that the [counterfeit money] was where he claimed [it was] . . ." *Aguilar v. Texas*, 378 U.S. 108, 109 (1964), and, where the informant is undisclosed, as here, his belief that the informant is credible or his information reliable. *Aguilar, supra*, at 114.

When an informant provides information that a certain illicit product is at a certain location, he is really making

two separate assertions: (1) That he knows that the product is at the location; and (2) that he recognizes the product as illicit. In neither *Aguilar* nor *United States v. Harris*, 403 U.S. 573 (1971), nor in any other case, has the Supreme Court required that the affidavit set forth the basis for the informant's knowledge as to (2). The District Court's insistence in the instant case that the affidavit set out the basis for both (1) and (2) presents an unnecessary and open-ended extension of *Aguilar*. It is unnecessary because the basis for the affiant's belief is the informant's reliability which *Aguilar* requires be set out in the affidavit. It is that reliability that apprises the Magistrate of the accuracy of the informant's perceptions. It is open-ended because there is no end to the degree of inquiry into the basis for someone's perceptions of truth.

The District Court's decision that the warrant must fail was based upon its finding that "the affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit . . ." (Opinion, A. 11). Since the corner stone of Judge Curtin's opinion is *Aguilar*, that case deserves discussion. The substance of the affidavit there was as follows:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and use contrary to the provisions of law. *Id.* at 109.

In striking at that affidavit, the Court articulated the two-pronged test referred to above. Judge Curtin had no difficulty with the second prong of the test, in fact, he found the informant reliable (Opinion at A. 10). But he strained too hard at the first-prong.

It is that first-prong of the test upon which this warrant rises or falls. A look at the affidavit reveals that the magistrate was informed of the following underlying circumstances: that the defendant who resides at 1536 Jefferson Avenue was observed by the informant on December 5, 1973 at that address in possession of a suitcase containing several hundred counterfeit $10 bills. There is no question that in the instant case the magistrate was not informed as to how the informant knew that what he observed were counterfeit bills. However, the *Aguilar* Court, in announcing its new test, did not require that the informant explain how he knew heroin to be heroin. By the same token, it was not necessary for the affiant in this case to set forth information as to how his informant knew the counterfeit money to be counterfeit money.

Similarly, in *United States v. Harris*, 403 U.S. 573 (1971), the Supreme Court upheld the search made pursuant to warrant even though the affidavit in support thereof did not demonstrate how the informant knew the whiskey was illicit, or even how he knew it was whiskey. The pertinent part of the affidavit in support of that search warrant read as follows:

> This person [confidential informant] has personal knowledge of and has purchased illicit whiskey from within the residence described for a period of more than two years, and most recently within the past two weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall" and has seen Roosevelt Harris go to the other outbuilding, located 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons. *Id.* at 575-576.

See *Jones v. United States, supra,* at 267-268 cited with approval in *United States v. Harris, supra,* at 578.

Nor did the Court in either *Draper v. United States,* 358 U.S. 307 (1959); nor *McCray v. Illinois,* 386 U.S. 300 (1967), require that the affidavit contain information showing how the informants knew that the narcotics were narcotics. Yet, in both these cases the Supreme Court upheld the arrest as supported by probable cause.

There is, of course, a contrary policy that has never really the day before the Supreme Court:

> The possibility remains that the information might have been fabricated. This is why our cases require that there be a reasonable basis for crediting the accuracy of the observation related in the tip. *Harris, supra,* at 593 (Harlan, J. dissenting).

This fabrication theory, however, seems to have been abandoned entirely by the majority in *Adams v. Williams,* 407 U.S. 143 (1972). There a stop and frisk was permitted on the tip of an undisclosed and untested informant.

Finally, Det/Sgt Hunter's affidavit should not be judged "as an entry in an essay contest." *Spinelli v. United States,* 393 U.S. 410, 438 (1969). As the Supreme Court said in *Ventresca,* at 108:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

And, at 109:

> Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

Considering, to a reasonable man, that it is highly unlikely that a person would be carrying a suitcase full of genuine currency, the issuing magistrate, City Court Judge Samuel Green, acting as a man of reasonable prudence, based on the circumstances, could conclude that there was probable cause to believe that the property to be searched was likely to contain counterfeit currency. *McCray v. State of Illinois, supra.*

Thus, the Supreme Court has found probable cause where: "The facts and circumstances within their [the officers] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925).

Conclusion

For the foregoing reasons, the order of the District Court suppressing the government's evidence should be reversed.

Respectfully submitted,

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ROGER P. WILLIAMS,
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AFFIDAVIT OF SERVICE BY MAIL

RE: U. S. A.
v
Greene Berry Mullens
Docket No. 74-2479

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 19 day of December, 1974 I mailed 2 copies of a printed Appendix and ~~xx~~ Brief the above case, in a sealed, postpaid wrapper, to:

James L. Lalime, Esq.

1710 Liberty Bank Building

Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Roger P. Williams, Assistant U. S. Attorney

502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

19 day of December, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19..7.5